L&N and by the Commission, which was granted by this Court on April 3, 1970, Mr. Justice Douglas dissenting. These appeals followed.

ARGUMENT

These appeals present no issue warranting plenary consideration by the Court, as the questions are manifestly unsubstantial. The Government expressly concedes that its separate appeal from the "Hummingbird" portion of the judgment may not warrant plenary review. (No. 387, J.S., pp. 6-7)[5] L&N's claim that the order reinstating the "Hummingbird" lacks "findings" and is a mandatory injunction, ignores the findings of the opinion itself, as well as L&N's pledge to restore the train if plaintiffs were successful in their appeals last term. (No. 386, J.S., pp. 13-15)[6] The carrier's further contention that the federal judiciary lacks power to grant injunctive relief in passenger discontinuance cases is without merit.[7]

---

[5] The Government's contention that the "Hummingbird" discontinuance is justified apart from the "Georgian" (No. 387, J.S., pp. 5-6), is simply at variance with the face of the Commission's decision in the "Hummingbird" case, (No. 387, J.S., pp. 32-33), as well as contrary to the express interrelationship noted by the agency in its "Georgian" report. (No. 386, J.S., p. 27) See also Appendix C hereto, 336 I.C.C. at 84-86. Moreover, the Government in the court below did not oppose plaintiffs' request in January, 1970, for summary remand of the "Hummingbird" in the event remand was granted for the "Georgian."

[6] A party taking action in the face of and with knowledge of requests for injunctive relief is subject later to restoration of the status quo. *Texas & N.O. R.R. v. Northside Ry.*, 276 U.S. 475, 479; *Porter v. Lee*, 328 U.S. 246, 251; *Porter v. Warner Co.*, 328 U.S. 395, 399. Moreover, although the court need not make findings in summary judgment proceedings, F.R. Civ. P. 52(a), it did so here.

[7] L&N analogizes section 13a(1) with section 15(7) of the Interstate Commerce Act, 49 U.S.C. 13a(1), 15(7), citing *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658. However, *Arrow* is strictly confined to the peculiar legislative history behind the freight rate suspension power. It applies to no other statute. 372 U.S. at 666, fn. 13. Moreover, *Arrow* is only applicable to situations prior to the entry of an agency order on the merits. Here, the C&EI and L&N orders

C&EI's discontinuance of its portion of the "Georgian" train, which portion originated in Chicago and operated in the States of Illinois and Indiana, is the heart of the matter; for in eliminating access to and from Chicago, the basic railroad passenger structure in the Southeast – embracing also the States of Missouri, Kentucky, Tennessee, Ohio Alabama, Georgia, Mississippi, and Louisiana–has virtually collapsed.

1. The Government's contention that the Commission may properly allow one railroad, transporting a train in through service with another railroad, to separately invoke the provisions of section 13a(1) without giving notice to the public in the area served by the entire run of the train, is contrary to the statute and contrary to elementary fairness.[8] The Government asserts that the statutory scheme of section 13a, by providing a railroad with the option of having the Commission, rather than the State agencies, pass upon discontinuance proposals, suggests that the Commission should replace State agencies only to the extent that they could have defeated a carrier's attempt to discontinue a train. Accordingly, since C&EI could have proceeded unilaterally to the Illinois and Indiana agencies, the Government urges that there should be no requirement in section 13a(1) as to notice in States which had no regulatory power over C&EI. (No. 386, J.S., pp. 7-8)

The Commission's construction of the statute is unsettled and of recent origin. The C&EI decision constituted the first final order of the Commission on the point.[9] More-

---

were both administratively final in every sense. There is nothing in the legislative history of section 13a to suggest a limitation on the judiciary. Congress was concerned with limiting the *Commission's* interim relief to a maximum four month period.

[8] A number of complaints were filed with the Commission by residents in the South who had received no notice of the C&EI discontinuance. See Appendix to Nos. 101 & 102, Oct. Term, 1969, at pp. 82-87.

[9] A different three-judge panel in the Northern District of Illinois, on June 4, 1970, set aside the Commission's piecemeal and disjointed handling of the "California Zephyr", operated by three railroads be-

over, where a single railroad seeks to discontinue only a portion of a passenger run, the agency has ruled that all stations and Governors over the run must be given notice, even that segment of the operation not proposed for discontinuance. *Chicago, M., St. P. & P.R.R. Co. Discontinuance of Trains*, 317 I.C.C. 761, 771-73.

The basic premise of the Government is contradicted by the legislative purpose and statutory language. One of the principal evils to which section 13a was directed was "the prior confused and time-consuming procedure under which the States supervised the discontinuance of passenger trains." *City of Chicago v. United States*, 396 U.S. at 164-65. Piecemeal discontinuances by State agencies were of primary concern to the Congress. Senator Bricker, one of the floor leaders, stated:

> "Mr. Bricker: Confusion arises when a railroad has, let us say, four trains running between Columbus, Ohio, and Indianapolis, Ind. Ohio might permit the railroad to take off 1 train, running at 10 a.m. and Indiana might permit the railroad to take off 1 train running at 2 p.m. But in that event the railroad would have to continue the operation of all of them in order to meet the requirements of the local and State groups. That situation has led to interminable delay and confusion which would be relieved as a result of enactment of the pending bill in that then the railroads would appeal to the Interstate Commerce Commission." (104 Cong. Rec. 10842)

Senator Smathers stated:

> "Mr. Smathers: What happens? The Public Utilities Commission of New York will approve the discontinuance of trains numbered 1, 6 and 12. The Public Utilities Commission of Pennsylvania will approve the discontinuance of trains numbered 2, 9, and 13.

---

tween Chicago, Ill. and San Francisco, Calif. The Commission and the United States have noticed appeals to this Court from that decision. Nos. 70 C 585 & 689, *City of Chicago v. United States* (Kerner, C.J., Will and Parsons, D.J.J.).

> The Public Utilities Commission of Delaware will approve the discontinuance of trains numbered 16, 19, and 8. They are never the same trains; with the result that, while the record of the public utilities commission is pretty good with respect to the number of applications they have granted, those trains are still operating. Why? Because the railroad cannot get the public utilities commissions to agree on the same trains." (104 Cong. Rec. 10851)

The Commission's construction of section 13a(1) would continue, at the federal level, the very same segmented evaluation of passenger trains which Congress sought to avoid by enactment of the legislation. Yet the National Transportation Policy is directed "all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail . . . adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." 49 U.S.C. preceding section 1. Accordingly, the Commission is mandated to examine the overall national interest in coordinated service. It cannot close its eyes to the complete train service, and serve as a mere substitute for an individual State agency. This court has emphasized that a federal standard applies to interstate train discontinuances. *City of Chicago v. United States*, 396 U.S. at 165.

The language of section 13a(1) is consistent with the legislative purpose of having the Commission examine the overall public public interest in passenger service, which overall view must embrace notice to, and the testimony of the affected public. A three-judge court recently struck down the Commission's interpretation of the statutory language of section 13a(1) on this point:

> "The Interstate Commerce Commission and the defendants interpret Section 13a(1) as only requiring each individual railroad to notify the Governors of the states in which it operates and each railroad may proceed under Section 13a(1) independently of the other railroads which together make up an entire train. *Southern Pacific Co. Discontinuance of Trains-*

Ogden, Utah, and Oakland, California, 333 I.C.C. 525 (1968). The Commission's interpretation is based on the concept that "train" as used in Section 13a(1) means one that is operated by one railroad between two or more states. It is our opinion that such interpretation is in direct conflict with the literal language of the statute.

"The statute begins "A carrier or carriers . . . (whose) . . . rights with respect to the discontinuance . . . of the operation . . . of any (interstate) train . . . are subject to any provision of the constitution or statutes of any State . . . may . . . file with the Commission and . . . mail to the Governor of each State in which such train is operated . . ." The logical reading of this statute is that more than one carrier can be a part of a single "train", otherwise the plural "carriers" would have no meaning. The Commission claims that such interpretation negates the policies behind the Transportation Act of 1958 in enacting Section 13a(1). Section 13a(1) was enacted in order that railroads would no longer have to obtain separate permission from each state regulatory agency in seeking to discontinue passenger trains and thereby avoid both the lack of uniformity and the long delay involved in such a procedure. The purpose of Section 13a(1) was to shift the venue from the state regulatory agencies to the Interstate Commerce Commission and at the same time permit the states involved to present their objections to the Commission. See *New Jersey v. New York, Susquehanna & Western Railroad Co.*, 372 U.S. 1 (1963)." *City of Chicago v. United States* (No. 70 C 585 & 689, N.D. Ill.-E.D., 6/4/70).

We agree with the Government that section 13a(1) is an optional statute. Section 13a(1) does not directly pre-empt State jurisdiction. A railroad has the option of proceeding to the States rather than to the Commission. But the mere fact that section 13a(1) is an optional statute does not mean that the federal agency is simply to act in the stead of the State authority. A railroad electing the greatly expedited federal procedure must comply with federal standards and with federal criteria. If C&EI wishes to enjoy the rapid and

expedited federal procedures, then notice must be given to the public and to all Governors in the areas served by the train.[10]

The court below correctly held that the notice given did not comply with the statutory requirements.

2. The district court took note of the action of the Commission in awarding C&EI's Chicago-Evansville line to L&N, rather than to Illinois Central Railroad Company, one of the important considerations in the Commission's determination being the anticipated maintenance and improvement of through passenger service between Chicago and the South via the C&EI and L&N routes. (No. 386, J.S., p. 14) That decision, sustained by the Supreme Court, provides an independent basis for affirming the judgment below. See: *Missouri Pac. R. Co.-Control-Chicago & E.I.R. Co.*, 327 I.C.C. 279 at 298, 301, 332, 338, 361-62; *Illinois Central Railroad Company v. United States*, 263 F.Supp. 421, aff'd 385 U.S. 457 (1967); and 336 I.C.C. 81 at 84-86, attached hereto as Appendix C, at pp. 4-6.

L&N, having acquired C&EI's Evansville line, is responsible for the passenger service findings relied upon by the Commission in awarding the line to it. Yet after securing approval in January, 1967, the carrier in June, 1967 commenced Commission proceedings aimed at termination of the "Georgina-Hummingbird" service. 336 I.C.C. 81 at 84-86 (App. C, pp. 4-6).

---

[10] C&EI, throughout its jurisdictional statement, assails the decision below for failure to specify the line or lines of route over which notices should be posted in the remanded proceedings. The contention is without merit since by consolidating the proceedings, the complete "Georgian" and "Hummingbird" routes would be before the Commission. Moreover, L&N's acquisition of the C&EI properties in June, 1969, renders unnecessary any separate C&EI notice. As noted, fn. 1, *supra*, we today fail to understand any C&EI interest in these proceedings.

CONCLUSION

For the reasons stated, we submit that the judgment of the district court should be affirmed.

Respectfully submitted,

RICHARD L. CURRY
BERNARD RANE
MARK GOLDSTEIN
511 City Hall Building
Chicago, Ill. 60602

EUGENE W. WARD
Cordell Hull Building
Nashville, Tenn. 37219

CHARLES E. GRIFFITH III
ROBERT E. KENDRICK
204 Metropolitan Courthouse Building
Nashville, Tenn. 37201

EDWARD J. HICKEY, Jr.
WILLIAM J. HICKEY
620 Tower Building
Washington, D.C. 20005

ARTHUR K. BOLTON
HAROLD N. HILL, Jr.
JOHN W. HINCHEY
132 State Judicial Building
Atlanta, Ga. 30334

WELDON A. COUSINS
737 National Bank of Commerce Bldg.
New Orleans, La. 70112

CHESTER L. RIGSBY
State Office Building
Frankfort, Ky. 40601

LEON M. DESPRES
77 W. Washington
Chicago, Ill. 60602

GORDON P. MacDOUGALL
705 Ring Building
Washington, D.C. 20036

Attorneys for Appellees

Of Counsel:

MATHIAS M. MATTERN
511 City Hall Building
Chicago, Ill. 60602

J. KENNETH ATKINS
Cordell Hull Building
Nashville, Tenn. 37219

WENDELL W. WRIGHT
MARION E. WRIGHT
106 N. Vermilion Street
Danville, Ill. 61832

KEITH E. ROBERTS
120 S. LaSalle Street
Chicago, Ill. 60603

ANTHONY HASWELL
2517 N. Burling
Chicago, Ill. 60614

WILLIAM E. NELSON
Dyer Building
Hoopeston, Ill. 60942

GEORGE B. TOFAUTE
17 Harding Avenue
Terre Haute, Ind. 47801

ROBERT P. DOOLITTLE, Jr.
801 Busseron Street
Vincennes, Ind. 47591

HENRY C. NEEL
Farm Credit Building
Henderson, Ky.

WILLIAM F. BLACK
CARL L. EVANS
State Office Building
Montgomery, Ala. 36102

CARL E. VanDORN
807 State Office Building
Indianapolis, Ind. 46204

BENNETT E. SMITH
State Office Bldg. - Rm. 1105
Jackson, Miss. 39201

SHELDON A. TAFT
GERALD P. WADKOWSKI
111 N. High Street
Columbus, Ohio 43215

August 1970.

APPENDIX A SERVICE DATE MAY 15, 1968

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 8th day of May, 1968.

Finance Docket No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL., AND EVANSVILLE, IND.

Upon consideration of the record in the above-titled proceedings, including the petition filed by the Cities of Chicago, Danville, Hoopeston, Terre Haute, Vincennes, and Watseka and the Village of Milford, on March 1, 1968, for reconsideration of the order of the Commission, Division 3, dated January 25, 1968, authorizing the above-titled discontinuance; applicant's reply thereto; petitioners' motion to strike certain matter appearing in the reply; and applicant's reply to the motion; and

It appearing, That the matters appearing in the reply to the petition objected to in the motion to strike are not of record in this proceeding and therefore not properly before this Commission as evidence and that no objection is made to the motion to strike;

It further appearing, That in order to invoke the jurisdiction of this Commission under section 13a(1) of the Interstate Commerce Act a carrier must comply with certain requirements, including the posting of notice "in each station, depot, or other facility involved" (49 CFR 43.5(j)), which notice must contain a "complete description of the present service of the train . . . involved and of the discontinuance or change of operation or service proposed" (49 CFR 43.5(c)); and that the purpose of requiring such notice is to give the travelling public affected the opportunity to protest the proposed discontinuance; and

It further appearing, That applicant in the above-titled proceeding failed to give the proper notice required, as described above, in that no notice was posted in those facilities along the through route of trains Nos. 93 and 54 south of Evansville, Ind., and the notice as posted contained no mention of the through-route nature of the trains south of Evansville; and that applicant therefore has not effectively invoked the jurisdiction of this Commission in the above-titled proceeding;

It is ordered, That the motion to strike certain matters appearing in applicant's reply to the petition for reconsideration be, and it is hereby, granted;

It is further ordered, That the petition, insofar as it seeks dismissal of the above-titled proceeding for failure to invoke this Commission's jurisdiction under section 13a(1), be, and it is hereby, granted, and in all other respects is denied.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON,
Secretary

(SEAL)

SERVICE DATE
MAY 15, 1968

APPENDIX B

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 8th day of May, 1968.

Finance Docket No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.— DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL., AND EVANSVILLE, IND.

Upon consideration of the record in the above-titled proceedings, including the petition filed by the Cities of Chicago, Danville, Hoopeston, Terre Haute, Vincennes, and Watseka and the Village of Milford, on March 1, 1968, for reconsideration of the order of the Commission, Division 3, dated January 25, 1968, authorizing the above-titled discontinuance; applicant's reply thereto; petitioners' motion to strike certain matter appearing in the reply; and applicant's reply to the motion; and

It appearing, That the order of the Commission, Division 3, acting as an Appellate Division, dated May 8, 1968, and served earlier on May 15, 1968, erroneously indicated that the Commission had granted the petition insofar as it sought dismissal of the above-titled proceeding for failure to properly invoke this Commission's jurisdiction under section 13a(1);

It further appearing, That the matters appearing in the reply to the petition objected to in the motion to strike are not of record in this proceeding and therefore not properly before this Commission as evidence and that no objection is made to the motion to strike;

It further appearing, That in order to invoke the jurisdiction of this Commission under section 13a(1) of the Interstate Commerce Act a carrier must comply with certain

requirements, including the posting of notice "in each station, depot, or other facility involved" (49 CFR 43.5(j)), which notice must contain a "complete description of the present service of the train . . . involved and of the discontinuance or change of operation or service proposed" (49 CFR 43.5(c)); and that the purpose of requiring such notice is to give the travelling public affected the opportunity to protest the proposed discontinuance.

It further appearing, That applicant in the above-titled proceeding gave the proper notice required, as described above; and

It further appearing, That no other new issues are raised or evidence of substance offered to support the request for reconsideration, and good cause has not been shown for granting the relief requested:

It is ordered, That the motion to strike certain matters appearing in applicant's reply to the petition for reconsideration be, and it is hereby, granted;

It is further ordered, That the petition for reconsideration be, and it is hereby, denied in all respects.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON,
Secretary

(SEAL).

Served December 12, 1969

F-9558

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 25765

LOUISVILLE AND NASHVILLE RAILROAD COMPANY DISCONTINUANCE OF TRAINS NOS. 3 AND 4 BETWEEN ATLANTA, GA., AND EVANSVILLE, IND., AND TRAINS NOS. 5 AND 10 BETWEEN EVANSVILLE AND ST. LOUIS, MO.

Decided December 3, 1969

Upon investigation, found that continuance of operation by the Louisville and Nashville Railroad Company of service by its passenger trains Nos. 3 and 4 between Atlanta, Ga., and Evansville, Ind., and its passenger trains Nos. 5 and 10 between Evansville, Ind., and St. Louis, Mo., is required by the public convenience and necessity and continued operation will not unduly burden interstate commerce. Operation ordered for a period of 6 months from the date hereof. Investigation discontinued.

F. Wesley Bowers, Clifford T. Coomes, Tyree B. Harris, Joseph L. Lenihan, W. Rhett Tanner, and *Ralph D. Walker* for Louisville and Nashville Railroad Company.

J. Fred Parker for Georgia Public Service Commission, *Carl E. Van Dorn* for State of Indiana, and *Eugene W. Ward* for Tennessee Public Service Commission, protestants.

David L. Stanley for city of Carmi, Ill., *Bernard Rane, Raymond F. Simon* and *Mathias M. Mattern* for city of Chicago, Ill., *Demetri Hassakis* for city of Mt. Vernon, Ill., *Robert S. Matthews* for city of Evansville, Ind., and *Albert W. McCallister* for village of Enfield and county of White, Ill., protestants.

Gordon P. MacDougall for passenger association, protestant.

W. E. Cobble, Gordon E. Cox, S. G. Davenport, B. L. Dresbach, Thomas J. Duggan, L. G. Freeman, Joe Hester, Richard H. Kraushaar, George B. Lee, Tom McNeal, Maurice F. Radrizzi, Robert P. Reynolds, Mack P. Rice, Henry Risner, Keith E. Roberts, D. M. Schmitt, W. R. Selby, George P. Sheahan, A. L. Shepherd, Harry T. Smith, J. H. Smith, W. C. Spencer and *G. I. Winn, Jr.*, for railway labor organizations, protestants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, DEASON, AND HARDIN

HARDIN, *Commissioner:*

On July 9, 1969, Louisville and Nashville Railroad Company (L&N), a common carrier by railroad subject to the provisions of part I of the Interstate Commerce Act, filed two separate notices and a single supporting statement pursuant to the provisions of section 13a(1) of the act proposing to discontinue operation on August 13, 1969, of its (1) passenger trains Nos. 3 and 4 between Atlanta, Ga., and Evansville, Ind., a distance of 444 miles, and (2) passengers trains Nos. 5 and 10 between Evansville and St. Louis, Mo., a distance of 165 miles, or a total distance of 609 miles.

Upon consideration thereof and of a petition filed July 25, 1969, by the National Association of Railroad Passengers (NARP), requesting the carrier's notice be rejected for lack of jurisdiction, and protests filed by the association, various communities, individuals, labor organizations and State regulatory agencies, the Commission, division 3, by order entered July 30, 1969, instituted an investigation of the proposal embracing the issues raised by the petition, and ordered continued operation of the trains for a period not to exceed 4 months beyond the date when the proposed discontinuance would otherwise become effective. Because of the statutory limitation upon the time available for investigation and decision, the order provided that hearings would be held, for the omission of a report and recommended order by the hearing examiner, and for certification of the record to us for initial decision. Pursuant to a later order, duly posted in stations served by the trains, public hearings were held at St. Louis, Carmi, Ill., Evansville, Hopkinsville, Ky., Nashville and Chattanooga, Tenn., and Dalton, and Atlanta, Ga., between September 24 and October 7, 1969, inclusive. Briefs have been filed.

As previously indicated, NARP in its petition requests rejection of the notices filed by L&N on the grounds that the carrier failed effectively to invoke the Commission's jurisdiction pursuant to section 13a(1) of the act in that the wording of the certificate of posting does not indicate whether both notices, i.e., the notice concerning trains Nos. 3 and 4, and the notice concerning trains Nos. 5 and 10, were in fact posted at all stations served by the trains between St. Louis and Atlanta, that neither notice sets forth the

fact that the subject trains Nos. 3-5 and 4-10 are single trains between Atlanta and St. Louis, that L&N has split its trains into two sections for the purpose of giving notice, and that even if both notices were in fact posted at all stations between St. Louis and Atlanta, section 13a(1) is not invoked because the trains to be discontinued are not set forth in the notice. It renews its request on brief filed jointly with other protestants. Protestants further contend that at no place on either of the L&N notices do trains Nos. 3-5 nor 4-10 appear and that neither notice, by itself, lists all of the stations which would be affected by the discontinuance of trains Nos. 3-5 and 4-10. Protestants renew the challenge of service of notice upon the States on the ground that the affidavit of service states only that an individual "caused" service by mail and that the use of the word "caused" was criticized by the Commission in a recent decision and the carrier warned that in the future strict compliance with the provisions for proper service would be required. The record, however, shows that L&N has properly invoked the Commission's jurisdiction under section 13a(1) of the act in that service was properly effected and that both notices were properly posted at all stations served by the subject trains. Each notice lists the stations served by the set of trains to which it principally applied and sets forth in clear and unambiguous language the fact that one set of trains connects with the other, and, further, that the subject trains are in fact four trains as published in the carrier's schedules two of which connect at Evansville with the other two to permit the performance of a through service between St. Louis and Atlanta. The petition is denied.

Protestants contend that, since discontinuance of the trains, which are the last L&N passenger trains into and out of St. Louis, would involve an abandonment of operations over certain facilities used solely for passenger trains, discontinuance of the trains may not be allowed absent approval under sections 1(18)-1(22) of the act. While L&N could well have submitted such an application concurrently with its notices filed herein, its determination not to do so at this time does not prejudice our action herein.

Protestants also argue on brief that a rehearing is required on the grounds of prejudicial error because the presiding hearing examiner (1) erred in not informing the parties at the Evansville hearing of their right to file a brief on a date 3 weeks from the final hearing date, (2) erred in refusing to permit cross-examination of certain L&N witnesses at Nashville and Atlanta hearings on

the ground a prior request had not been made, (3) erred in receiving in evidence three L&N "rebuttal" exhibits not responsive to any opposition testimony, and that permitting such "rebuttal" testimony at Chattanooga deprived labor of the right to cross-examine effectively an important part of L&N's case, and (4) erred in sustaining objections at the Chattanooga hearing tending to show that L&N had a preconceived plan to withhold direct testimony concerning the role of passenger train service to industrial development until such community witnesses had been heard. The record shows that the presiding hearing examiner, shortly after the opening of the hearing at St. Louis, advised all parties present that briefs may be filed about 3 weeks after the final date of hearings and that the date for filing of briefs would be fixed on the final day of hearing. The date for filing of briefs 3 weeks hence was announced on the last day of hearing at Atlanta. No party was prejudiced by such action. The record shows that the rebuttal evidence offered while in some respects may be interpreted as exceeding the limitations of proper rebuttal is not such as would warrant our reversal of the ruling of the examiner and preclude its consideration by us in the determination of the issues involved. Our order specifying the procedure to be followed in the presentation of evidence did provide the presiding hearing examiner with considerable latitude in the conduct of the hearing. The ruling with respect to the request to cross-examine certain witnesses at Nashville and Atlanta on the ground that a prior request had not been made was proper, within the purview of our order, and was not prejudicial to the parties.

Background.– The L&N system operates as a north and south railroad, south from Cincinnati, Ohio, to Atlanta; south from Cincinnati to Louisville, Ky., Nashville, Tenn., New Orleans, La., Pensacola and Chattahoochee, Fla., and intermediate points; south from Chicago, Ill., to Evansville, Nashville and Atlanta, and intermediate points; and north from Atlanta to Chattanooga, Nashville and Memphis, Evansville and St. Louis, serving intermediate points.

Trains Nos. 3 and 4 were formerly numbered Nos. 93 and 54 (between Evansville and Atlanta) and trains Nos. 5 and 10 were formerly numbered Nos. 53 and 92 (between St. Louis and Nashville). In October 1967, the current numbers were adopted as a part of systemwide numbering of L&N trains. No change in service resulted from that change of numbers. Trains Nos. 5 and 10 are shown separately from trains Nos. 3 and 4 because of a prior requirement in *Louisville & N. R. Co. Discontinuance of Trains,*

331 I.C.C. 203, that L&N continue the operation of trains Nos. 53 and 92 between St. Louis and Evansville for a period of 1 year from November 22, 1967.

L&N, in conjunction with Chicago & Eastern Illinois Railroad Company (C&EI), formerly maintained coordinated "Georgian-Hummingbird" passenger train service connecting Chicago, Cincinnati, and St. Louis with a number of southeastern United States points. One segment of the "Georgian" operated between Chicago and Evansville (trains Nos. 93 and 54) over the C&EI with C&EI engines and traincrews and at the latter point L&N engines and crews were substituted. The "Georgian" continued as an L&N train between Evansville and Nashville, where some cars were transferred to the "Hummingbird" train, the latter train originating at Cincinnati and scheduled to arrive Nashville concurrently with the "Georgian." At Nashville cars destined to Atlanta were switched from the "Hummingbird" to the "Georgian" and cars destined to Montgomery and Mobile, Ala., were switched from the "Georgian" to the "Hummingbird." The St. Louis segment of the "Georgian" operated (trains Nos. 92 and 53) over L&N between St. Louis and Nashville, via Evansville, where its equipment was added to the "Georgian" and where passengers could also transfer to the "Hummingbird." After such switching at Nashville, the "Georgian" went on to Atlanta, and the "Hummingbird" went south to Birmingham, Montgomery and Mobile, Ala., and New Orleans, La. Those trains provided complete sleeping and dining facilities.

In *Missouri Pac. R. Co.–Control–Chicago & E.I.R. Co.*, 327 I.C.C. 279 (1965), sustained *sub nom. Illinois Central Railroad Company* v. *United States*, 263 F. Supp. 421, affirmed *per curiam* 385 U.S. 457 (1967), C&EI's Chicago-Evansville line was awarded to L&N rather than Illinois Central, one of the important considerations in the Commission's determination being the anticipated maintenance and improvement of through passenger service between Chicago and the South via the C&EI and L&N route. L&N and C&EI were directed to complete negotiations for the line within 1 year from February 7, 1967.

On June 28, 1967, L&N filed a notice under section 13a(1) of the act to discontinue the St. Louis segment of the "Georgian" trains between St. Louis and Nashville and in *Louisville & N.R. Co. Discontinuance of Trains, supra*, the trains (Nos. 92 and 53) were ordered continued between St. Louis and Evansville and permitted to be discontinued between Evansville and Nashville. On August 31, 1967, however, C&EI filed a notice under section 13a(1) proposing

to discontinue the Chicago-Evansville segment of the "Georgian" trains (C&EI-L&N trains Nos. 93 and 54); and in *Chicago & E.I.R. Co. Discontinuance of Trains*, 331 I.C.C. 447, served January 31, 1968, the trains were permitted to be discontinued. As a result of those proceedings the "Georgian" trains originated at Evansville instead of Chicago with the connecting segment between St. Louis and Evansville. A few days later, on February 3, 1968, L&N removed all sleeping and dining facilities from the Evansville-Atlanta segment of the "Georgian" trains. Subsequent to discontinuance by C&EI of the Chicago-Evansville segment of the "Georgian" trains, L&N sought reopening and reconsideration of the proceeding involving the St. Louis segment of the "Georgian" trains in *Louisville & N. R. Co. Discontinuance of Trains, supra*, but the further hearings scheduled were canceled at L&N's request. L&N also filed a notice under section 13a(1) of the act to discontinue the connecting "Hummingbird" trains (Nos. 6 and 7) over the route between Cincinnati and New Orleans predicating loss of passenger business on its trains from discontinuance of the trains by C&EI. On May 15, 1968, a petition by protestants for reconsideration of action taken in *Chicago & E.I.R. Co. Discontinuance of Trains, supra*, was denied. Court review of our action therein was instituted by the city of Chicago and others, protestants, on May 27, 1968. On September 6, 1968, in *Louisville & N.R. Co. Discontinuance of Trains*, 333 I.C.C. 720, discontinuance of the "Hummingbird" trains was permitted. That action was temporarily restrained and on January 8, 1969, in *City of Chicago* v. *United States*, 294 F. Supp. 1103 and *Tennessee Public Service Commission* v. *United States*, 294 F. Supp. 1106, both actions were dismissed. That action was appealed and on June 16, 1969, probable jurisdiction was noted by the United States Supreme Court, 395 U.S. 957, where the matter is still pending. It is significant, in the light of the background, to note that this proceeding was instituted on July 9, 1969.

Basis for the proposal.—L&N bases its proposal to discontinue the operation of the subject trains principally on alleged savable losses of $811,388 in 1967, $672,359 in 1968, and $519,055 for the first 7 months of 1969. Based on the representations (1) that the Post Office Department will, effective November 29, 1969, remove storage mail now moving on the subject trains to highway service, L&N projects its losses for year 1969 would approximate $883,615, and an annual loss of $942,364 after the Post Office Department takes the mail off the trains, (2) that passenger revenues

and passenger utilization of the service has been low and is decreasing at a substantial rate, and (3) that there is alternate service available. L&N submits the subject trains are no longer required and that continued operation imposes an undue burden on interstate commerce.

Description of train operation.—These trains are the last passenger trains between Atlanta and Evansville and between Evansville and St. Louis. For all practical purposes they operate as a single pair of trains between Atlanta and St. Louis, via Evansville, but are published in two separate schedules. Trains Nos. 3 and 4 are operated daily between Evansville and Atlanta and trains Nos. 5 and 10 are operated daily between St. Louis and Evansville upon schedules shown in appendix A, which reflects all intermediate points served together with their respective populations. Train No. 4 operates daily departing Atlanta at 5:15 p.m. (e.s.t.) arriving Evansville at 3:40 a.m. (c.s.t.). Train No. 4 connects with train No. 10 which departs daily from Evansville at 4:15 a.m. (c.s.t.) and arrives at St. Louis at 8:55 a.m. (c.s.t.). Train No. 5 departs daily from St. Louis at 4 p.m. (c.s.t.) and arrives at Evansville at 8:30 p.m. (c.s.t.). Train No. 5 connects at Evansville with train No. 3, which departs Evansville at 9:40 p.m. (c.s.t.) and arrives Atlanta at 10:55 a.m. (e.s.t.).

The normal consist of trains Nos. 4-10 is one diesel locomotive, one Atlanta-Nashville storage mail car, one Nashville-St. Louis storage mail car, one Atlanta-St. Louis baggage and mail car, and one Atlanta-St. Louis reclining seat coach. During June, July, and August an additional coach is added on weekends. One deadhead Atlanta-Nashville storage mail car is also carried on each of 5 days of the week. No sleeping or dining cars are now carried on the trains. The normal consist of trains Nos. 3-5 is one single-unit diesel locomotive, one St. Louis-Atlanta storage mail car, one St. Louis-Atlanta baggage and mail car, and one St. Louis-Atlanta coach with an additional coach on weekends during June, July, and August. On 5 days a week two additional Nashville-Atlanta storage mail cars are carried on train No. 3. One deadhead storage mail car is also carried between St. Louis and Nashville. No sleeping or dining cars are carried on the trains nor is any food service available for the convenience of passengers on any of the trains during the 609-mile trip between St. Louis and Atlanta, such services having been discontinued in 1966 on the St. Louis-Evansville trains when the trains were designated trains Nos. 53 and 92, and in February 1968, on the Evansville-

Atlanta trains. That circumstance is frequently referred to by protestants as contributing to declining patronage, but defended by the railroad as an economy measure. While there is no food service available or provided on the trains, the carrier represents that southbound passengers on train No. 5 have a 70-minute layover at Evansville before proceeding on train No. 3 to Atlanta, and have available a restaurant across the street from the L&N railroad station, and passengers on train No. 3 are given time (10 minutes) at Chattanooga to obtain breakfast. Northbound passengers on train No. 4 arrive Chattanooga at 8:30 p.m. and depart at 8:45 p.m., and may obtain evening meal service at that point. No other convenient point is provided on train No. 10 which departs Evansville at 4:15 a.m. arriving St. Louis at 8:55 p.m.

Each train handles passengers, some U. S. mail, and baggage. No express, except for a single movement on train No. 3 from Nashville to Atlanta, has been handled on trains Nos. 3 or 4 since April 1, 1968. No express has been handled on trains Nos. 5 or 10 since April 1, 1968. Some express previously handled on these trains now moves trailer-on-flatcar (TOFC).

Storage mail now moves in these trains. However, the Post Office Department has notified L&N that the last day for handling bulk mail at L&N's Nashville station will be November 28, 1969, and that effective November 29, 1969, substantial changes with respect to transportation of storage mail will be instituted. In that regard, effective April 18, 1969, the Nashville to Kansas City, Mo., storage mail was diverted to TOFC service by order of the Post Office Department. All other storage mail now moving in these trains will be diverted to star routes by highway carriers. Thereafter, only a small amount of preferential mail would be expected to be handled on these trains.

The passenger coaches utilized by these trains are described by the carrier as modern and well maintained, of steel and aluminum construction, purchased new in 1946, and have seating capacity of 60 persons in each coach. The coaches are equipped with reversible reclining seats, are air conditioned, have modern lighting, washroom and toilet facilities. All cars are equipped with trucks designed to provide easy, comfortable riding. The equipment is serviced and receives interior cleaning prior to departure from Atlanta and St. Louis and exterior cleaning at Atlanta. The single unit E-class diesel passenger locomotive equipment now used in the operation of these trains is more than 20 years old. That equipment together with passenger equipment

and L&N owned head-end cars used on the trains would be retired on discontinuance of their operation, if authorized. Foreign line head-end cars would be returned to the owners.

Financial data.—The carrier's balance sheet statement as of June 30, 1969, shows assets of $1,049.3 million, including current assets $95 million, special funds $4.7 million, investments $39.2 million, total properties less reserve for depreciation and amortization $900.4 million, and other assets and deferred charges $9.8 million. Liabilities were: Current liabilities $60.5 million, long-term debt due within 1 year $29 million, long-term debt due after 1 year $423.9 million, reserves $5.7 million, other liabilities and deferred credits $19.2 million, capital stock $123.9 million, capital surplus $22.1 million and retained income unappropriated $364.6 million. L&N income statements for 1967, 1968, and first 6 months of 1969 show, respectively, railway operating revenues of $285.3 million, $301.7 million, and $161.7 million; net railway operating income of $31.4 million, $35.0 million and $19.3 million; and ordinary net income after fixed charges and other deductions of $19.9 million, $22.9 million, and $13.1 million.

Financial results.—L&N submitted financial results of the trains' operation for 1967, 1968, and first 7 months of 1969. Revenues during 1967 and 1968 include passenger, mail, express, baggage, dining and passenger car rental. During the 1969 partial-year period revenues include passenger, mail, express and baggage only. Passenger counts are for the 19 months' period ended July 31, 1969. Excluding maintenance-of-way and structures expense, L&N data show in 1967 trains Nos. 3 and 5 revenues of $1,064,861, and out-of-pocket expenses of $1,519,674, for an out-of-pocket loss of $453,813. During the same period for trains Nos. 4 and 10 revenues were $1,134,769 and out-of-pocket expenses $1,439,380, for an out-of-pocket loss of $304,611. In 1968, the L&N data show trains Nos. 3 and 5 as having revenues of $477,264, and out-of-pocket expenses of $822,718, for an out-of-pocket loss of $345,454. During the same period trains Nos. 4 and 10 revenues were $570,751, and out-of-pocket expenses $815,338, for an out-of-pocket loss of $244,587. During the first 7 months of 1969, the data show trains Nos. 3 and 5 as having revenues of $227,723, and out-of-pocket expenses of $457,844, for an out-of-pocket loss of $230,121. During the same period trains Nos. 4 and 10 revenues were $194,013, and out-of-pocket expenses of $426,243, for an out-of-pocket loss of $232,230. Operation of the

combined trains for the periods indicated shows, respectively, revenues of $2,199,630, $1,048,015, and $421,736, out-of-pocket expenses of $2,958,054, $1,638,056, and $884,087. The net out-of-pocket losses, after excluding maintenace of way and structures and giving effect to feeder value, but before Federal income tax effect, are, respectively, $566,397, $564,618, and $461,282. Operations for 1969 (projecting data from the first 7 months) are expected to produce net out-of-pocket (savable) losses, before Federal income tax effect, of $784,130, and projecting such data for the period December 1, 1969 through November 30, 1970, would approximate net pre-tax out-of-pocket (savable) loss of $942,364. The latter figure is submitted to show effect of loss of mail on November 29, 1969. L&N argues that discontinuance of the trains in 1967 or 1968 would have been warranted considering the losses it shows in those periods, and that continued operation in the light of the projected 1969 loss of $784,000 reflecting feeder gain based on current operations, and in the light of the annual loss of $942,364 reflecting loss of U. S. mail effective November 29, 1969, after deducting gain from that mail which would move in TOFC, and which may be expected as a minimum loss for future years, cannot be justified. L&N further argues that such losses cannot be justly absorbed by it because such losses are an uneconomic drain on its working capital.

L&N's financial results of the operation of both sets of trains for the first 7 months of 1969 and as projected for all of 1969 based on present operation are shown in appendix B. L&N expects benefits from a net annual savings through discontinuance excluding maintenance of way and structures, but including feeder traffic gain, of $784,130 before provision for taxes (26.4 percent rate) and $577,119, after such provision. Projected for a 12-month period December 1, 1969 through November 30, 1970, L&N expects to realize a net annual savings through discontinuance, excluding expense for maintenance of way and structures, and including gain from U. S. mail diversion, of $942,364 before provision for taxes (estimated at 24.6-percent rate) and $710,544 after such provision. Passenger revenues were determined by applying system average revenue per passenger-mile to the actual number of revenue passenger-miles developed on these trains and reflect the 10-percent increase effective July 1, 1968.

Passenger-miles attributable to the subject trains were obtained from an analysis of ticket collections and daily reports submitted by conductors on these runs. Mail revenues were based on actual

billings. Express revenues (carload) are actual; less than carload are based on calculations using car foot-miles applicable to the trains as against the system totals. Baggage revenues are actual. Wages of train and enginecrews are actual amounts paid, to which has been added allowance for appropriate payroll taxes, vacation, holiday, health and welfare, paid by L&N for account of the crews. Locomotive repairs, fuel, lubricants, other locomotive supplies, and enginehouse expenses are based on a system average cost (excluding overhead) per diesel unit-mile applied to the diesel unit-miles operated by the subject trains. Locomotive and car depreciation costs and costs of deadheading cars, and the wages and fringe benefits of station employees at Nashville are excluded from out-of-pocket expenses of the subject trains. Such losses are thus claimed to be understated for the 1969 projection by $80,199.

Passenger car repairs and train supplies and expenses were computed by applying system average cost (excluding overhead) per passenger car-mile to the car-miles operated by the subject trains Nos. 3, 5, 4, and 10. Rent for passenger train cars was computed by multiplying appropriate mileage rate by the mileage accrued on the L&N (in the subject trains) for foreign line passenger cars operating between Atlanta and St. Louis. Personal injury and property damage expenses were computed on basis of average annual cost per passenger train-mile using expenses charged to passenger service and passenger train-miles for the system.

Terminal expenses covered expenses at St. Louis, Evansville, and Atlanta, as well as cost of operation of joint-line facilities. These were calculated on an avoidable cost basis approved by this Commission in *Chicago, R. I. & P. R. Co. Discontinuance of Trains*, 328 I.C.C. 278. Discontinuance of trains Nos. 5 and 10 would eliminate all these expenses since they are the last L&N passenger trains to utilize the terminals. Those expenses included are costs of operating the trains through various zones of the terminal plus bridge transfer charges and trackage charge for use of main-line tracks and East St. Louis, Ill., relay passenger station. Expenses at Evansville include cost of operating the subject trains through the joint terminal, apportioned to L&N and C&EI on number of cars into and out of terminal. However, effective February 3, 1968, that terminal ceased to be a joint operation and no expenses are shown after that date for the subject trains. Expenses at Atlanta include cost of operating the

subject trains into and out of joint terminal, apportioned to L&N, Seaboard Coast Line, and Georgia Railroads on number of cars into and out of terminal. However, effective January 26, 1969, terminal ceased to be jointly operated and no expenses are shown after that date for operating subject trains into and out of terminal. Station employees expense and station supplies expense as shown are actual. Discontinuance of the trains would eliminate the positions of the former and there would be no need for the latter.

Passenger revenues projected for 1969 were determined by using the passenger revenues earned during the first 7 months of 1969, and adjusting to 12 months assuming heavier travel during vacation months and special holidays. No adjustment was made to reflect the downward trend in rail passenger utilization. The mail revenues projection was estimated on basis of notice received from the Post Office Department that all storage mail would be discontinued on the subject trains effective November 29, 1969, and upon advice of post office officials that limited preferential mail would continue on the subject trains. Projected expenses were applied as previously described for current operations using consist of one locomotive, one coach and one head-end car on each of the subject trains, and assumed no additional equipment during heavy travel periods. Feeder revenue and expenses were predicated on analysis from samples of passenger and mail traffic feeding to and from the subject trains. While protestants express some dissatisfaction with a number of areas of L&N's financial data their arguments are not persuasive.

Use of the train service.—L&N's evidence shows that there has been a decrease in passenger-miles for trains Nos. 4-10 and 5-3 between Atlanta and St. Louis in recent years. Passenger-miles for trains Nos. 4-10 for 1967, 1968 and first 7 months of 1969 were 16,779,931, 6,000,831, and 1,288,508, respectively. Passenger-miles for trains Nos. 5-3 were 17,017,116, 4,082,958, and 918,233 for the same periods, respectively. For the separate segments trains Nos. 3 and 4 between Atlanta and Evansville passenger-miles for 1966, 1967, and 1968 were 36,167,888, 30,271,327, and 7,661,396, respectively. As to trains Nos. 5 and 10 passenger-miles for the same periods were 4,998,844, 3,525,-720, and 2,422,393, respectively.

L&N's passenger count data covers a period of 18 months beginning February 1, 1968 and ending July 31, 1969, during which the subject trains carried 33,829 passengers (18,480 on trains Nos. 4-10 and 15,349 on trains Nos. 5-3). During that period, 8,211

passengers boarded train No. 4 at Atlanta, of which 1,918 came from other connections, 3,552 at Nashville, of which 1,835 came from other connections, 1,975 at Chattanooga, of which 208 came from other connections, 330 at Hopkinsville, 322 at Marietta, Ga., 264 at Tullahoma, Tenn., 152 at Dalton, 108 at Madisonville, Ky., 79 at Cartersville, Ga., 70 at Henderson, Ky., and 4 at Guthrie, Ky. The same train on departing Evansville as No. 10, received on board 1,566 passengers, 683 at Carmi, 418 at McLeansboro, 297 at Mount Vernon, Ill., 271 at Mount Vernon, Ind., 122 at Nashville, Ill., 28 at Enfield, Ill., 27 at Belleville, Ill., and 1 at St. Louis. Of those passengers detraining from train No. 4, 4,017 detrained at Nashville, Tenn., of which 2,573 went to other connections, 768 at Evansville, 774 at Chattanooga, of which 14 went to connecting trains, 263 at Tullahoma, 223 at Hopkinsville, 100 at Madisonville, 74 at Henderson, 12 at Dalton, 9 at Marietta, and 5 at Guthrie. On the same train departing Evansville as No. 10, 11,065 detrained at St. Louis, of which 4,972 went to connecting trains, 368 at Belleville, 360 at Mount Vernon, Ill., 157 at East St. Louis, 80 at Carmi, 70 at Nashville, Ill., 53 at McLeansboro, 39 at Mount Vernon, Ind., 30 at Enfield and 13 at Ashley, Ill. Trains Nos. 4-10 carried a daily average of 84.4 passengers during that period.

During the same 18-month period, 6,948 passengers boarded train No. 5 at St. Louis, of which 728 came from connecting trains, 713 at Mount Vernon, Ill., 553 at Belleville, 247 at Nashville, Ill., 189 at East St. Louis, 166 at Carmi, 128 at McLeansboro, 121 at Mount Vernon, Ind., 118 at Enfield, 37 at Dahlgren, Ill., and 12 at Ashley. The same train departing Evansville as train No. 3, received 934 passengers, of which 101 came from other connecting trains, 3,644 at Nashville, Tenn., of which 2,718 came from other connections, 400 at Chattanooga, of which 3 came from other connections, 554 at Marietta, 266 at Hopkinsville, 129 at Tullahoma, 99 at Henderson, 97 at Madisonville, 2 at Dalton, and 1 at Cartersville. Of those passengers detraining from train No. 5, 1,502 detrained at Evansville, 930 at Carmi, 731 at Mount Vernon, Ill., 702 at McLeansboro, 379 at Mount Vernon, Ind., 266 at Nashville, Ill., 112 at Dahlgren, 109 at Enfield, 82 at Ashley, 49 at Belleville, 11 at East St. Louis, and 1 at Maunie, Ill. On the same train departing Evansville as No. 3, 5,704 detrained at Atlanta, of which 1,177 went to connecting trains, 2,263 at Nashville, Tenn., of which 1,423 went to other connections, 1,424 at Chattanooga, of which 190 went to connecting trains,

242 at Marietta, 197 at Madisonville, 174 at Hopkinsville, 148 at Tullahoma, 83 at Dalton, 74 at Henderson, and 66 at Cartersville. Trains Nos. 5-3 carried a daily average of 28.6 passengers during that period.

Alternate passenger transportation services.— Between Chattanooga and Atlanta the Southern Railway operates a pair of trains Nos. 3 and 4, over a route which serves only the intermediate point of Dalton, Ga. Except for the subject trains and the aforementioned trains of Southern, no other rail service is available between the points involved. Numerous bus schedules daily each way are operated between Atlanta and St. Louis, and serve 19 of the 24 stations which are served by the subject trains. Seven schedules (3 westbound and 4 eastbound) operate daily serving Atlanta, St. Louis, and all but 5 of the above 24 stations. Forty-four (22 between Atlanta and Chattanooga) operate daily between Atlanta, Marietta, Cartersville, Dalton, Chattanooga, Tullahoma, Nashville, Tenn., Guthrie, Hopkinsville, Madisonville, Henderson, Evansville, Carmi, Mount Vernon, Ashley, Nashville, Ill., Belleville, and East St. Louis.

By air, service is available at Atlanta, Chattanooga, Nashville, Evansville and St. Louis, with frequent flights between those points daily. In recent years there has been a substantial increase in airline service available and utilized to and from the points named.

In summary, aside from the subject rail service, St. Louis is served daily by 42 air schedules and 10 bus schedules, East St. Louis, Belleville, Henderson, and Madisonville by 10 bus schedules, Nashville, Ashley, and Mount Vernon, Ill., by 8 bus schedules, Carmi by 4 bus schedules, Evansville by 14 bus schedules and 8 air schedules, Hopkinsville by 11 bus schedules, Guthrie by 4 bus schedules, Nashville, Tenn., by 20 bus schedules and 35 air schedules, Tullahoma by 6 bus schedules, Chattanooga by 40 bus schedules and 24 air schedules, Dalton by 19 bus schedules, Cartersville by 27 bus schedules, Marietta by 25 bus schedules, and Atlanta by 41 bus schedules and 63 air schedules. As indicated, Dahlgren, McLeansboro, Enfield, Maunie, Ill., and Mount Vernon, Ind., have no alternate public transportation service available.

Generally paralleling the route between the principal termini is a network of public highways and some segments of high-speed interstate and toll roads for users of private automobiles and the record reflects a growth in the number of automobiles using

the public highways in the States involved. Those roads are all-weather roads and for the most part are U. S. highways. Maunie is served by a county road and Mount Vernon, Ind., by a State road. The record indicates, however, that some of the highways are still under construction or in a bad state of repair.

Effect upon employees.—Discontinuance of the subject trains would affect 43 positions, including 32 train and enginecrew positions. There are two regular crews assigned to the operation of the trains Nos. 3-5 and 4-10 in each of the four seniority districts. Of the 32 train and engine service positions there are (1) six engineman and six fireman positions, six conductor positions and six trainman positions which comprise three four-man crews for train No. 3 and three four-man crews for train No. 4 over the 444-mile segment between Atlanta and Evansville each train travels, and (2) two engineman positions, two fireman positions, two conductor positions, and two trainman positions which comprise one four-man crew for train No. 5 and one four-man crew for train No. 10, over the 165-mile segment between Evansville and St. Louis. Of the 11 station employee positions, 9 are located at Atlanta and 1 each at Chattanooga and Evansville. The railroad has no passenger service employees at St. Louis, and the station organization there acts as its representative.

Included in the above, eight firemen are protected employees, four whose employment would be eliminated shortly by retirement; the balance within a year by attrition. Those employees operating the subject trains have been in service many years and can, by exercising seniority right, displace younger men. The latter would be placed on the extra-board. The carrier points out that there is a constant movement from the extra-board to regular assignments due to average turnover each year brought about by retirement under the Federal Railroad Retirement Act, deaths, and other causes.

Certain rail labor groups assert that employees will be adversely affected by discontinuance and some urge that we impose protective conditions such as those in *Chicago, B. & Q. R. Co.—Abandonment*, 257 I.C.C. 700. Having no authority to impose such conditions, we limit our consideration of the effect upon employees to its relation to the public convenience and necessity and the burden on interstate commerce issues. Should these trains be allowed to discontinue operation the temporary slight adverse effect such discontinuance may have on individual employees does

not warrant extended discussion as it appears that such dislocation except for station employees would be for a relatively short time.

Alternatives to complete discontinuance.—Our order instituting investigation herein required the parties to be prepared to present evidence on, among other things, the feasibility of requiring the continuance in part of the trains' service, including, but not limited to, service over a segment of the route, weekend, seasonal, holiday or special run service, mixed passenger-freight service, or a combination of the foregoing or other limited service. The carrier contends that these alternatives were neither feasible nor practical in that they would serve only to produce ineffective costly segmented operations.

Evidence in opposition.— Fifty-one individuals testified in opposition to the discontinuance, including a State senator (Indiana), the mayors of Evansville, Carmi, and McLeansboro, and a number of city officials of Mount Vernon, Ill. As representatives of the communities they serve, they express deep concern over the proposed discontinuance of rail passenger service to their communities as they consider the service vital and necessary. Other public witnesses include representatives of the Public Service Commissions of Indiana and Tennessee, two members of NARP, and numerous business and professional persons, small shop owners and operators, farmers, housewives, retired persons, railroad employees, and members of rail labor organizations. Additionally, it was stipulated that seven individuals at Evansville and five at Carmi, if called, would testify similarly to other witnesses at those points. The tenor of the evidence presented by those opposing discontinuance covers a broad spectrum. Most of those expressing opposition were concerned by continued operation of the trains between St. Louis and Evansville, although a number were concerned with connections for points beyond. Others were concerned with transportation to and from Atlanta and Chattanooga. Their use of the trains was generally for visits to the larger cities for purposes of shopping, visiting relatives in hospitals, and meeting doctors' appointments; some were concerned with use of the trains for business purposes primarily because of the convenience the trains provided and others for baggage accommodation; some were elderly and found rail transportation more suited to their needs; and some preferred rail over other modes, generally. A number of complaints were expressed as to the quality of the service and the cleanliness of the cars and facilities on the cars. Many complained about the lack of food and sleeping

car service and failure of air conditioning or heating equipment which, if corrected, could have improved the situation. Complaints were also expressed respecting poor on-time performance, the long layover at Evansville, and the priority of movement given freight trains over the subject trains. A number also expressed concern over poor lighting on occasions and lack of clean washrooms. Complaint was also made that while several years ago the train speed was generally 70 miles per hour maximum it had been reduced to a 60-mile per hour maximum and more recently reduced to a 50-mile per hour maximum, and that the ride was particularly rough indicating the roadbed could be improved. The carrier offered evidence, however, to show some effort was being made to improve the condition of the roadbed. While their use of the trains ranged from once a week to several times annually (although some had not used the service for a number of years), the consensus generally was that the quality of the service was vastly in need of improvement.

L&N, on brief, contends that the subject trains are being operated at heavy financial loss, and that substantial savings would be realized by their discontinuance. It also takes the position that discontinuance of the trains in 1967 or 1968 would have been warranted considering the heavy losses in those years, and that their continued operation in 1969, in the light of current operations as projected and in the light of the projection subsequent to November 29, 1969, reflecting loss of mail, constitutes an onerous burden. It further contends that if required to continue operation of the trains it will incur $8 in savable expenses for each $1 of revenue collected and that more than 100,000 passengers annually (or 300 daily) would be required to liquidate such a loss and approach the breakeven point on the basis of such projected operations after November 29, 1969, or an increase of 828 percent. It maintains the evidence shows that passenger traffic will continue to decline despite the steady increase in the population at the stations served by the trains, that those traveling locally use the bus or private passenger cars, while those traveling between the major cities are increasing their use of commercial airlines, and that remaining transportation services will be entirely adequate.

Protestants, in their joint brief, argue that the trains are required by the public convenience and necessity. While acknowledging that the record here reveals a sharp decline in the patronage of the trains since February 1, 1968, they contend that the decline was brought about by four principal developments. First, they

argue, the C&EI discontinuance (Chicago-Evansville) on February 1, 1968, caused a severe reduction in passenger traffic since passengers can no longer travel by rail between Chicago and Evansville, pointing out that trains Nos. 3 and 4 generated 13.7 million and 14.8 million passenger-miles, respectively, in 1967, and that those trains generated only 3.2 million and 4.5 million miles, respectively, in 1968, and that such comparison understates the effect of the C&EI discontinuance since the C&EI segment operated for the month of January 1968. Second, they argue, was the discontinuance of the "Hummingbird" trains on January 9, 1969, which resulted in reduction in patronage, because approximately 30 percent of the users of train No. 4-10 and 36 percent of the users of train No. 3-5 transferred to or from the "Hummingbird" at Nashville during the period March-December, 1968. Third, they argue, was the removal of dining and sleeping car facilities on trains Nos. 3 and 4 between Evansville and Atlanta after discontinuance of the C&EI segment. Fourth, they argue, is the activity of L&N to discourage use of the trains, pointing to the reduction in passenger train speed from 70 miles per hour maximum to the present 50 miles per hour maximum and the long delay (1 hour, 10 minutes) at Evansville. Because of such factors, protestants contend the decline in patronage does not reflect a comparative decline in the public need for the trains between St. Louis-Evansville-Atlanta.

The protestants also argue that discontinuance of the subject trains should not be permitted prior to a ruling by the Supreme Court on the pending "Georgian" and "Hummingbird" appeals in *City of Chicago* v. *United States, supra,* and *Tennessee Public Service Commission* v. *United States, supra,* since, if the appellants prevail, discontinuance would make restoration of the "Georgian-Hummingbird" service impossible because the connecting link or middle segment will have been eliminated.

Discussion and Conclusions

Here, as in most proceedings under section 13a(1) of the act, we are faced with a proposal to discontinue a rail passenger service (here the last sets of trains between the termini) that has been conducted at a loss. The removal of Railway Post Office cars by the Post Office Department in recent years and subsequent action by it in instigating or permitting the shift of storage mail to TOFC

on freight trains as well as the present proposal to shift the transportation of mail to star routes by highway carriers has not improved the situation.

Among the factors generally considered in proceedings under section 13a(1) of the act to ascertain whether operation or service of passenger trains is required by the public convenience and necessity and will not unduly burden interstate commerce, are the population served, the effect upon the communities, the extent of the use by the public of the service sought to be discontinued, other available or alternate transportation service in the area, the cost incurred and financial loss sustained by the carrier in providing the service under consideration, and the carrier's financial condition. Also warranting our consideration in determining the public convenience and necessity is whether or not we, in administering section 13a(1) of the act, are preserving a national transportation system by rail for passengers, insofar as is needed, to meet the changing needs of commerce, among others. We must evaluate the public convenience and necessity requiring the continuance of the service, on the one hand, with, on the other, the degree of burden imposed on interstate commerce due to the carrier's financial loss resulting from continuance of the trains. No factor alone is conclusive or controlling. The weight afforded each is determined by the circumstances presented in each case.

Concerning the public convenience and necessity, L&N here has endeavored to show that in measuring the public need for the trains there has been a decrease in passenger traffic in recent years and that the decreased patronage has been marked. The evidence of record also clearly shows, however, that decrease in patronage was undoubtedly due in no small measure to a marked deterioration in the service provided by these trains, a matter wholly within the province and control of the railroad. Most of the complaints voiced regarding service deficiencies are, in our opinion, justified on the basis of the record. No dining cars or other food service facilities are provided on the trains for any segment of the 609-mile run, not even food or beverage vending machines. As previously noted, dining car service was discontinued on the Atlanta-Evansville segment in February 1968, a few days after discontinuance of the C&EI Chicago-Evansville segment of the "Georgian." To obtain any sustenance, other than carrying their own food aboard, passengers must leave the train during the 70-minute layover at Evansville and cross the street to an all-night restaurant to obtain refreshments. While train No. 5-3 on the south-

bound trip from St. Louis to Atlanta arrives and departs Evansville at 8:30 p.m. and 9:40 p.m., respectively, train No. 4-10 on the northbound trip arrives at Evansville at the early morning hour of 3:40 a.m., departing at 4:15 a.m. The only other time food is obtainable is during a 10- or 15-minute stop (depending on the direction of travel) at Chattanooga. As to providing food and beverage vending machine service on these trains, the record shows that L&N had studied vending machines previously, but not for these particular trains. While several witnesses complained of the lack of sleeping car service, most of the complaints regarding the absence of sleeping car and eating facilities centered on the lack of food service.

With respect to complaints of poor on-time performance, the record shows that out of 28 trips during January 1969, train No. 5-3 southbound from St. Louis arrived late at Atlanta on 16 occasions and was on time on only 12. On seven of these trips the train was over 1 hour late, from 30 minutes to 1 hour late on three, from 15 to 30 minutes late on five, and less than 15 minutes late on one occasion. During the same period, out of a total of 27 trips, train No. 4-10 northbound from Atlanta arrived late in St. Louis on 22 occasions, and arrived on time on only 5. The train was over 1 hour late on 12 occasions, from 30 minutes to 1 hour late on 7, and from 15 to 30 minutes late on 3. During the months of June, July, and August 1969, out of a total of 92 trips, train No. 5-3 was late in arriving in Atlanta on 52 occasions and arrived on time on 40. It was over 1 hour late on 5 trips, from 30 minutes to 1 hour late on 10, from 15 to 30 minutes late on 17, and less than 15 minutes late on 20. During the same months train No. 4-10, out of a total of 91 trips, arrived late in St. Louis on 56 occasions and was on time on 35. On 10 trips it was over 1 hour late, from 30 minutes to 1 hour late on 14, from 15 to 30 minutes late on 21, and less than 15 minutes late on 11. While we recognize that trains are delayed at times for reasons beyond the carrier's control, we find little such explanation of record in this proceeding. The on-time performance of these trains leaves much to be desired and is not conducive to retention of or increase in patronage. In a similar vein, and as previously noted, numerous complaints were made with respect to the reduction of the maximum speed of these trains from 70 to 60, and more recently, to 50 miles per hour. Those complaints are, in our view, justified, but, as also previously noted, the record indicates that the carrier is taking steps to rectify this situation. We would expect L&N to continue its efforts

in this direction. We are also of the view that L&N should explore the possibility of reducing the lengthy layover time at Evansville. We do not agree that the carrier was precluded by any prior order of the Commission from taking such steps as may be necessary to effect such change, including an appropriate petition to the Commission. Other reasons for the decrease in patronage are the elimination of porters, slower schedules, dirty cars, and poorly equipped facilities, such as washrooms, et cetera, all of which are significant in the eyes of the users of the service. It may be added that had L&N continued to exercise diligence toward its passenger service after removing sleeping cars and food service facilities, as it had prior thereto, instead of removing services not only attractive to the rail passenger but vital to the latter's support of rail transportation service, it would have, in our opinion, enjoyed revenue from its passengers more in keeping with the amount of revenue received in the recent period of record and would have incurred considerably less loss in the operations of the trains in those recent periods of record here. With respect to promotional efforts on the carrier's part, the record shows that the last large advertising of its passenger service took place in about 1963. Also in this connection, however, we are aware of the need for the public to demonstrate, by its patronage of these trains, the extent to which it considers such service to be required by the public convenience and necessity.

As previously indicated, L&N anticipates loss effective November 29, 1969, of a substantial portion of mail traffic currently handled on the subject trains. L&N filed the notice proposing to discontinue these trains on July 9, 1969, almost 5 months before the mail traffic was expected to be diverted. The claimed burden on interstate commerce from continued operation of the subject trains is predicated on *pro forma* financial data "giving effect" to operations without mail revenues which have not yet been lost. While L&N has attempted in that *pro forma* presentation to show revenue cost data which it anticipates may be applicable to the operation of trains under new consists and operating arrangements the carrier chose not to afford any time to determine what the actual operating results might be and to assume that operating losses necessarily would flow from elimination from the trains' earnings of the revenues which theretofore had accrued from the mail traffic. In the absence of evidence showing L&N's actual experience in the operation of these last trains under the anticipated new arrangement the record does not provide a basis for reaching a conclusion as to the resulting operating situation.

The degree of burden on interstate commerce as a result of loss financially incurred by L&N in continuing to operate the subject trains depends for all practical purposes on how seriously such financial loss will affect its other passenger and freight operations. It is obvious on this record that L&N is incurring losses in operating the subject trains. However, we do not believe the losses sustained will place an undue burden on or seriously affect its other passenger and freight operations during the period we will require the continued operation of these trains.

In view of the fact that there remains a significant number of so-called "hard-core" passengers using the trains, the likelihood that patronage would increase with more attractive service, that future revenues and expenses do not reflect the experience of the carrier under circumstances it only anticipates would result, and considering the carrier's financial position, a continuation of the subject trains for a reasonable period to determine whether its revenue and expense expectations will be borne out, allowing it also time to extend some improvement to attract passenger traffic which it has long failed to do, is warranted. Following actual experience under the changed circumstances, a new judgment can be made as to financial results of the operations and how these relate to the public need for continuance in whole or in part.

Contentions of the parties as to fact or law not specifically discussed herein have been given consideration and found to be without material significance or not justified.

We find that operation by Louisville and Nashville Railroad Company of passenger service on its trains Nos. 3 and 4 between Atlanta, Ga., and Evansville, Ind., and trains Nos. 5 and 10 between Evansville and St. Louis, Mo., is required by the public convenience and necessity and will not unduly burden interstate commerce.

An appropriate order will be entered.

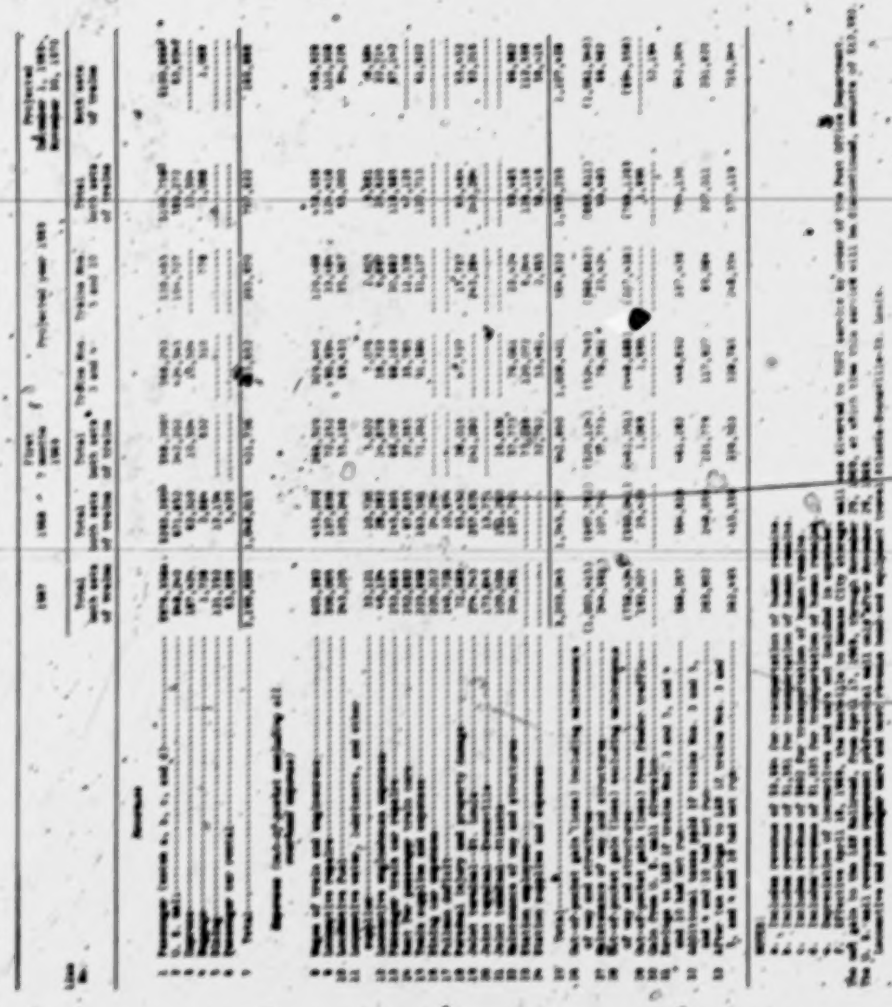
COMMISSIONER TUGGLE concurs in the result.

APPENDIX A

Trains Nos. 4-10 daily (read down)	Miles	Station	Population *1968	Trains Nos. 3-5 daily (read up)
Train No. 4				*Train No. 5*
5:15 p.m. (EST)	0	Lv. Atlanta, Ga	515,000	Ar. 10:55 a.m. (EST)
H 5:51 p.m.	20	Lv. Marietta, Ga	27,800	Lv. H 10:10 a.m.
R 6:25 p.m.	45	Lv. Cartersville, Ga	10,000	Lv. R 9:31 a.m.
H 7:23 p.m.	96	Lv. Dalton, Ga	18,700	Lv. H 8:30 a.m.
8:30 p.m.	134	Ar. Chattanooga, Tenn	122,000	Lv. 7:35 a.m.
8:45 p.m.		Lv. Chattanooga, Tenn		Ar. 7:25 a.m.
9:44 p.m. (CST)	216	Lv. Tullahoma, Tenn	15,507	Lv. 4:19 a.m. (CST)
11:20 p.m.	285	Ar. Nashville, Tenn	250,887	Lv. 2:55 a.m.
11:45 p.m.		Lv. Nashville, Tenn		Ar. 1:40 a.m.
Y 12:42 a.m.	333	Lv. Guthrie, Ky	1,211	
Y 1:16 a.m.	357	Lv. Hopkinsville, Ky	22,800	Lv. Y 11:33 p.m.
Y 2:13 a.m.	392	Lv. Madisonville, Ky	13,400	Lv. Y 10:44 p.m.
Y 3:02 a.m.	431	Lv. Henderson, Ky	21,000	Lv. X 10:02 p.m.
3:40 a.m. (CST)	444	Ar. Evansville, Ind	145,000	Lv. 9:40 p.m. (CST)
Train No. 10				*Train No. 3*
4:15 a.m. (CST)	444	Lv. Evansville, Ind		Ar. 8:30 p.m. (CST)
4:46 a.m.	463	Lv. Mt. Vernon, Ind	6,201	Lv. 7:40 p.m.
	475	Lv. Maunie, Ind	363	Lv. T 7:26 p.m.
5:16 a.m.	482	Lv. Carmi, Ill	6,152	Lv. 7:14 p.m.
f 5:27 a.m.	492	Lv. Enfield, Ill	791	Lv. B 6:59 p.m.
5:50 a.m.	505	Lv. McLeansboro, Ill	2,951	Lv. 6:40 p.m.
	515	Lv. Dahlgren, Ill	480	Lv. f 6:26 p.m.
6:27 a.m.	530	Lv. Mt. Vernon, Ill	15,500	Lv. 6:05 p.m.
N 6:52 a.m.	546	Lv. Ashley, Ill	662	Lv. 5:40 p.m.
f 7:05 a.m.	557	Lv. Nashville, Ill	2,805	Lv. 5:27 p.m.
7:48 a.m.	592	Lv. Belleville, Ill	30,680	Lv. 4:44 p.m.
8:17 a.m.	606	Lv. East St. Louis, Ill	78,000	Lv. 4:18 p.m.
8:55 a.m. (CST)	609	Ar. St. Louis, Mo	665,000	Lv. 4:00 p.m. (CST)

f - Stops on signal.
B - Stops to leave or take pay passengers.
H - Stops to take or leave pay passengers from or to Nashville and beyond.
N - Stops to leave pay passengers from points south of Evansville and to take pay passengers for East St. Louis and beyond.
R - Stops to take or leave pay passengers to or from points beyond Evansville.
T - Stops to leave or take pay passengers from or to Evansville, St. Louis, or beyond. Train No. 5 also stops at Maunie on Sundays to leave or take pay passengers.
X - To detrain revenue passengers from St. Louis and beyond and to take for Nashville and beyond.
Y - Stops to leave or take revenue passengers from or to Evansville or Nashville and beyond.

* Source: Rand McNally Commercial Atlas and Marketing Guide, 1960, 1969.



C. 25

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 3d day of December 1969.

Finance Docket No. 25765

LOUISVILLE AND NASHVILLE RAILROAD COMPANY DISCONTINUANCE OF TRAINS NOS. 3 AND 4 BETWEEN ATLANTA, GA., AND EVANSVILLE, IND., AND TRAINS NOS. 5 AND 10 BETWEEN EVANSVILLE AND ST. LOUIS, MO.

Investigation of the matters and things involved in this proceeding having been made pursuant to the order of said division dated July 30, 1969, a hearing having been held and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the Louisville and Nashville Railroad Company be, and it is hereby, required to continue the operations of its trains Nos. 3 and 4 between Atlanta, Ga., and Evansville, Ind., and trains Nos. 5 and 10 between Evansville and St. Louis, Mo., for a period of 6 months from the date hereof;

And it is further ordered, That this investigation be, and it is hereby, discontinued effective 35 days from the date of service of this order.

By the Commission, division 3.

H. NEIL GARSON,

(SEAL) Secretary.